COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2015-SC-000159-D
(2013-CA-001246)

KENTUCKY RETIREMENT SYSTEMS, et al — APPELLANTS

v.

CHARLES WIMBERLY — APPELLEE

BRIEF FOR APPELLANTS

KENTUCKY RETIREMENT SYSTEMS

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief for Appellants has been mailed, postage prepaid, on this the 16th day of November, 2012 to: Hon. John Gray and Hon. Roy Gray, 331 St. Clair Street, Frankfort, Kentucky 40601; Hon. Thomas D. Wingate, Franklin Circuit Court, 222 St. Clair Street, Frankfort, Kentucky 40601; and Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601.

I further certify that the Record on Appeal, from the Clerk of the Court of Appeals, was not withdrawn by counsel for Appellants.

Leigh A. Jordan Davis
Attorney for Appellants

INTRODUCTION

This is an appeal by Appellants, Kentucky Retirement Systems, et al, of the Opinion of the Kentucky Court of Appeals which erroneously upheld the decision of the Franklin Circuit Court that reversed the Appellants' administrative decision to deny Appellee's application for disability retirement benefits pursuant to KRS 61.600.

STATEMENT CONCERNING ORAL ARGUMENTS

Appellants believe that oral arguments on this matter may be helpful for the Court's understanding of the issues.

STATEMENT OF POINTS AND AUTHORITIES

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

The case at bar is an appeal of the decision of the Court of Appeals, which erroneously upheld the decision of Franklin Circuit Court. The Franklin Circuit Court erred in reversing Kentucky Retirement Systems' (hereinafter Appellants) administrative decision to deny Charles Wimberly's (hereinafter Appellee) application for enhanced disability retirement benefits.

Appellee is a member of the County Employees Retirement System (CERS), administered by Kentucky Retirement Systems, by virtue of his past employment with Transit Authority of River City ("hereinafter TARC"). Appellee has 136 months of total service credit with a membership start date of September 1, 1991 and a last day of paid employment on July 20, 2002. Appellee last worked as a Coach Operator for TARC. As found by the original Hearing Officer, the Appellee's position was sedentary to light duty. (A.R., p. 531).

Appellee filed two applications for disability retirement benefits. Appellee submitted his initial application on February 7, 2003. (A.R., p. 3). Appellee's application was twice evaluated by the Medical Review Board and denied. (A.R., pp. 274-280; 294-299). Appellee appealed the decision and was provided a full evidentiary hearing. After the hearing, the Hearing Officer issued findings of fact, conclusions of law, and a recommendation to deny the disability claim. (A.R., pp. 530-542). Appellants issued a final order adopting the Hearing Officer's recommendation. (A.R., p. 550). Appellee

chose not to challenge the Appellants' final decision and did not file a petition for judicial review with the Franklin Circuit Court under KRS Chapter 13B.

Appellee filed a second application for disability retirement benefits on June 3, 2004. This occurred following the Hearing Officer's recommendation and the filing of exceptions, but just prior to the Appellants issuing their Final Order denying disability benefits in the first administrative action. The second application was filed just prior to the expiration of the 24 month deadline for the filing of a disability application after Appellee's last day of paid employment. (A.R., pp. 551-554). Appellee's second application was again twice evaluated and denied by the Medical Review Board. (A.R., pp. 827-832, 860-864). Appellee once more requested an evidentiary hearing.

Prior to the hearing on the second application, the parties and the Hearing Officer discussed whether the doctrine of *res judicata* applied to evidence and claims previously adjudicated in the first administrative proceeding. Counsel for Appellee at that time filed a brief regarding the issue. Post hearing, the Hearing Officer issued findings of fact, conclusions of law, and a recommended order again denying Appellee's claim of disability under KRS 61.600. (A.R., pp. 986-1004)[1]. The Hearing Officer's order noted that Appellee did not appeal his first determination, that Exhibits 1-35 were part of the previous adjudication, and began his review with the records submitted with the Appellee's second application.

With respect to *res judicata,* the Hearing Officer's findings of fact reflect that much of the evidence submitted with the second application was duplicative of that submitted with the first application and was previously ruled upon by the initial Hearing

Officer and the Disability Appeals Committee in Appellee's initial proceeding. The Hearing Officer specifically held that the Appellee "failed to provide any additional medical evidence to show that his conditions would prevent him from performing the duties of a Coach Driver for TARC as previously determined in the first decision." (A.R., p. 1002).

The Disability Appeals Committee of Appellants' Board of Trustees carefully reviewed all the evidence of record and remanded the matter to the Hearing Officer for specific findings on whether the Appellee's conditions pre-existed his membership. (A.R. p. 1031)[2]. The Hearing Officer issued a recommended order on remand that Appellee's alcoholism was a pre-existing condition that, at a minimum, indirectly resulted in the Appellee's cardiac condition. (A.R. pp. 1034-1036)[3]. The Board of Trustees adopted the Hearing Officer's recommendations, entering a final order denying Appellee's second application for enhanced disability retirement benefits. (A.R., p. 1041)[4].

Appellee appealed this final agency action to Franklin Circuit Court. The lower court initially correctly affirmed on the grounds of administrative *res judicata*.[5] Appellee filed a motion to Alter, Amend or Vacate. Franklin Circuit Court subsequently granted Appellee's motion, vacating its previous Opinion.[6] Franklin Circuit Court then issued another Opinion and Order reversing the Final Order of the Board of Trustees of Kentucky Retirement Systems.[7] Kentucky Retirement Systems filed a Motion to Alter,

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[1] Attached hereto as Appendix I.
[2] Attached hereto as Appendix H.
[3] Attached hereto as Appendix G.
[4] Attached hereto as Appendix F.
[5] Attached hereto as Appendix E.
[6] Attached hereto as Appendix D.
[7] Attached hereto as Appendix C.

Amend, or Vacate the new Opinion. The Franklin Circuit Court denied Kentucky Retirement Systems' Motion to Alter, Amend or Vacate.[8]

Appellants immediately sought review with the Kentucky Court of Appeals, which erroneously affirmed the Franklin Circuit Court, finding that *res judicata* does not bar a reviewing court from reconsidering, on subsequent (second) application, previously adjudicated evidentiary facts.[9] The Court of Appeals further erred by failing to correctly apply existing case law on issue preservation. The Court of Appeals' decision was ordered to be published, perpetuating the misapplication of the law.

Appellants thereafter filed a Motion for Discretionary Review, as the Court of Appeals erred in affirming the erroneous decision of Franklin Circuit Court. This Motion for Discretionary Review was granted by this Honorable Court on September 16, 2015, along with the matter of *Kentucky Retirement Systems v. Dianne Carson*, 2015-SC-000094-D.

THE LAW

KRS 61.600 provides for disability retirement to members of Kentucky Retirement Systems and reads in pertinent part as follows:

> (1) Any person may qualify to retire on disability, subject to the following conditions:
>
> * * *
>
> (e) A person's disability application based on the same claim of incapacity shall be accepted and reconsidered for disability if accompanied by new objective medical evidence. The application shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment in a regular full time position,

[8] Attached hereto as Appendix B.
[9] Attached hereto as Appendix A.

* * *

(2) Upon the examination of the objective medical evidence by licensed physicians pursuant to KRS 61.665, it shall be determined that:

(a) The person, since his last day of paid employment, has been mentally or physically incapacitated to perform the job, or jobs of like duties, from which he received his last paid employment. In determining whether the person may return to a job of like duties, any reasonable accommodation by the employer… shall be considered;

(b) The incapacity is a result of bodily injury, mental illness, or disease. For purposes of this section, "injury" means any physical harm or damage to the human organism other than disease or mental illness;

(c) The incapacity is deemed to be permanent; and

(d) The incapacity does not result directly or indirectly from bodily injury, mental illness, disease, or condition which preexisted membership in the system or reemployment, whichever is most recent.

* * *

(3) Paragraph (d) of subsection (2) shall not apply if:

(a) The incapacity is a result of bodily injury, mental illness, disease, or condition which has been substantially aggravated by an injury or accident arising out of or in the course of employment; or

(b) The person has at least sixteen (16) years' current or prior service for employment with employers participating in the retirement systems administered by the Kentucky Retirement Systems.

(4) (a) 1. An incapacity shall be deemed to be permanent if it is expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months from the person's last day of paid employment in a regular full-time position.

2. The determination of a permanent incapacity shall be based on the medical evidence contained in the member's file and the member's residual functional capacity and physical exertion requirements.

* * *

(KRS 61.600)(in effect at time of Claimant's last day of paid employment).

* * *

ARGUMENT

I. Standard of Review.

An appellate court's role in a KRS Chapter 13B appeal is to review the administrative decision, not to reinterpret or reconsider the merits of the claim, nor to substitute its judgment for that of the agency as to the weight of the evidence. *500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet*, 204 S.W.3d 121, 131 (Ky. App. 2006). The reviewing court may only overturn the decision if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence on the record. *Kentucky State Racing Comm. v. Fuller*, 481 S.W.2d 298 (Ky. 1972). As long as there is substantial evidence in the record supporting the agency's finding, the reviewing court must defer to that finding, even if there is evidence to the contrary. *Kentucky Comm. on Human Rights v. Fraser*, 625 S.W.2d 852 (Ky. 1981). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. *Fuller*, 481 S.W.2d at 298.

Likewise, the reviewing court may not substitute its own judgment as to the inferences to be drawn from the evidence of record for that of the administrative agency. *Railroad Comm. v. Chesapeake & Ohio*, 490 S.W.2d 763 (Ky. 1973). The trier of facts in an administrative agency "is afforded great latitude in its evaluation of the evidence

heard and the credibility of witnesses appearing before it." *Bowling v. Natural Resources and Envtl. Protection Cabinet*, 891 S.W.2d 406, 409-410 (Ky. App. 1994). "To put it simply the trier of facts in an administrative agency may consider all the evidence and choose the evidence that he believes." *Id.*, at 410. As long as there is substantial evidence in the record supporting the agency's finding, the Court must defer to that finding, even if there is evidence to the contrary. *Kentucky Comm. on Human Rights v. Fraser*, 625 S.W.2d 852 (Ky. 1981).

II. The Court of Appeals erred when it improperly failed to apply the doctrine of administrative *res judicata*.[10]

This Honorable Court should reverse the Court of Appeals' published Opinion, which completely disregards a decade of established case law applying the doctrine of administrative *res judicata* to disability claims under KRS 61.600.

The Court of Appeals erred when it found that Appellants argued that Appellee was prevented from filing a second application for disability benefits. Specifically, the lower court inexplicably found, "[W]e find no merit in KERS' argument that Wimberly was somehow prevented from filing this second application." (Court of Appeals' Opinion, p. 8)[11]. This statement illustrates the lower court's misunderstanding of the present matter and the arguments before it. Appellants never argued that the Appellee

[10] This issue was preserved for appeal in the Appellants' pleadings before Franklin Circuit Court, their Pre-hearing Statement and Briefs before the Court of Appeals, and in their Motion for Discretionary Review.
[11] Notably, the Court of Appeals made an identical erroneous finding in *Kentucky Retirement Systems v. Dianne Carson*, 2015-SC-000094-D, which has also had discretionary review granted.

was barred from filing a second application for disability benefits. Such an application is clearly provided for in KRS 61.600(1)(e)[12]:

> A person's disability reapplication based on the same claim of incapacity shall be accepted and reconsidered for disability if accompanied by new objective medical evidence. The reapplication shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment in a regular full-time position.

Under the statute governing disability retirement benefits for Kentucky Retirement Systems, if an application for disability is denied, the applicant may reapply (submit a second application) if the application is timely and predicated upon "new" evidence.

Appellants actually emphasized to the lower court that because the Appellee did not challenge the final order denying his first application for disability retirement benefits under KRS 61.600 by filing a KRS Chapter 13B appeal to the circuit court, the findings from the first administrative appeal are binding under the doctrine of *res judicata.* (See Appellants' Court of Appeals' Brief, p. 10). Appellants noted that *res judicata* applies to Appellee's second application because the prior administrative proceeding afforded Appellee a full and fair opportunity to litigate the issues and a final order was rendered. *Kentucky Comm'n on Human Rights v. Lesco Mfg. & Design Co.*, 736 S.W.2d 361 (Ky. App. 1987). *Lesco* represents the well-established standard that *res judicata* applies to administrative actions. *See also Bauer v. Alcoholic Beverage Control*, 320 S.W.2d 126 (Ky. App. 1959) (*res judicata* applied to an administrative agency's denial of a liquor license finding no real change in circumstances from the first application to the second

[12] In effect on the Appellee's last day of paid employment. Later versions of the statute contain this same language in (2).

application.). In the present matter, the Court of Appeals' published opinion would serve to lessen this long held standard, which should not be permitted by this Honorable Court.

In presenting its argument that administrative *res judicata* applies specifically to Kentucky Retirement Systems, Appellants relied upon years of unanimous Court of Appeals' decisions in *Hoskins v. Kentucky Retirement Systems*, 2011 WL 112147 (Ky. App.); *Holland v. Kentucky Retirement Systems*, 2003 WL 1256710 (Ky. App.); and *Howard v. Kentucky Retirement Systems*, 2013 WL 5603579 (Ky. App.).[13] The "Three H's" represent a decade of established case law that has consistently held that the doctrine of *res judicata* applies to disability determinations made by the Kentucky Retirement Systems.

In *Hoskins v. Kentucky Retirement Systems, et al.*, 2009-CA-000905-MR (Ky. App. 2011), the Court of Appeals so held when it clearly stated that an applicant for disability benefits cannot re-litigate the same facts and issues on a second application under the doctrine of *res judicata*. As correctly noted by Franklin Circuit Court in its original decision in this matter that affirmed the Appellants' determination, the facts in *Hoskins* closely mirror those in the case at bar.[14] *Hoskins* further held that an applicant for disability retirement benefits must have shown by new objective medical evidence, not previously considered, that he was incapacitated since his last day of paid employment. The *Hoskins* Court specifically held:

> The doctrine of *res judicata* prevents the relitigation of the same issues in a subsequent appeal and includes every matter belonging to the subject of

[13] Cited pursuant to CR 76.28(4)(c) and attached to hereto as Appendix J, K, and L.
[14] Franklin Circuit Court's original August 3, 2012 Opinion and Order, p. 7.

> the litigation which could have been, as well as those which were, introduced in support of the contention of the parties on the first appeal. *Id.* at 487-88. **The Board properly refused to consider evidence and arguments which were presented in the first application. We find no error in this decision.** (Emphasis added).

Furthermore, in the case of *Holland v. Kentucky Retirement Systems*, 2001-CA-000484-MR (Ky. App. 2003), the Court of Appeals also unambiguously held that when an individual fails to appeal the board's determination, *res judicata* applies. The Court stated, **"[B]ecause Holland did not appeal from the board's order adopting the hearing officer's conclusion, this finding is *res judicata*."** (Emphasis added). In such a case, similar to the present matter, the *Holland* court held there must be additional evidence not previously considered that would support a finding of incapacity.

More recently, the Court of Appeals again reaffirmed the doctrine of administrative *res judicata* as it applies to Kentucky Retirement Systems' disability retirement cases. In *Howard v. Kentucky Retirement Systems*, 2012-CA-001488-MR (Ky. App. 2013), the Court specifically recognized that the application of *res judicata* is appropriate to a second application for disability retirement benefits, stating: **"[I]t must also be noted that because this is Howard's second application for benefits, *res judicata* applies; therefore, we only review denial of benefits as it relates to the new evidence submitted with the second application."** (Emphasis added). In the present matter, Appellants correctly applied the doctrine of *res judicata* in accordance with years of established case law as demonstrated in the "Three H's" discussed above.

The decade of established case law confirming the application of *res judicata* to disability retirement claims under KRS 61.600 exists for good reason. *Res judicata* serves the essential function of preventing repeat litigation over the same claims with the same

set of facts. KRS 61.600(2)[15] embodies this doctrine with its plain language requiring the introduction of new facts (objective medical evidence) as a pre-requisite to successive applications. The requirement of new facts safeguards against endless litigation. Otherwise, individuals could file repetitive duplicative applications in an attempt to draw a different medical review board panel or different Hearing Officer, to revisit what had already been denied, after having been provided full due process. Said due process having included an opportunity to be heard at a meaningful time and in a meaningful manner as required by *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Ky. Comm'n on Human Rights v. Lesco Mfg & Design Co.*, 736 S.W.2d 361 (Ky. App. 1987), *Lesco* specifically held that for *res judicata* to bar future litigation, there must be a full and fair hearing including a judicial-type adversary proceeding, with testimony taken under oath, witnesses being available for cross-examination and a record of the proceeding.

In the instant matter, the Court of Appeals directly contradicted years of established case law by upholding the determination of the Franklin Circuit Court, rejecting the doctrine of administrative *res judicata*. The Court of Appeals then held:

> KRS 61.600(2) requires new evidence to be submitted upon a second application, and if no new evidence is submitted, *res judicata* applies. However, when new evidence is submitted, as in the instant case, *res judicata* does not bar a reviewing court from considering the evidence presented in an initial application and a subsequent reapplication to determine whether substantial evidence supports the disability determination.

(Court of Appeals' Opinion, p. 10). The Court of Appeals merely gave cursory acknowledgement to the doctrine of administrative *res judicata*, and then made the

[15] KRS 61.600(2) represents the current version of the statute. At the time of Appellee's last day of paid employment, this same language was contained in KRS 61.600(1)(e).

application of the doctrine irrelevant by holding that the smallest modicum of new evidence reopens the old evidence to reconsideration[16].

The Court of Appeals acknowledged Appellants' citation of *Hoskins* and *Howard*, but then did not analyze or attempt to legally or factually distinguish those cases. The Court of Appeals' holding directly conflicts with *Hoskins* and *Howard*. Those cases are clear that a claimant must meet his burden of proof by the submission of new objective medical evidence not considered in the first application, and that the review of a disability determination should consider only the new evidence submitted with the second application.

Furthermore, the Court of Appeals erred in finding that the issue of *res judicata* was not raised during the administrative appeal, or considered by the Hearing Officer in his recommended order. (Court of Appeals' Opinion, p. 11). The issue of *res judicata* was clearly raised during the administrative process, as the Hearing Officer noted during the administrative hearing that a discussion had previously taken place regarding the applicability of *res judicata* or estoppel to the matter, and then counsel for Appellee filed a brief with his position on the issue, which was then entered as an exhibit to the administrative record. (Tape, 9:51:08-9:51:28; A.R., pp. 907-909).

The Court of Appeals further erred when it held that the Hearing Officer's recommendation reflected his consideration of the evidence from the first application. A review of the Hearing Officer's recommended order in whole clearly shows that he noted that Exhibits 1-35 were a part of the original determination, and then began his review of

[16] This Honorable Court should take note that the Court of Appeals in *Carson* found that *res judicata* did not apply at all. These two decisions from the Court of Appeals, issued only a month apart, contradict each

the evidence with the records submitted as part of the second application. (A.R., p. 988). The Hearing Officer found that the objective medical records Appellee submitted as a part of the current action were either duplicative of the evidence previously filed in his first administrative action, or long post-dated his employment and did not reflect his condition since his last day of paid employment, as required by KRS 61.600(5)(a). The Hearing Officer specifically found that Appellee "failed to provide any additional medical evidence to show that his conditions would prevent him from performing the duties of a Coach Driver for TARC as previously determined in the first decision." (A.R., p. 1002)(emphasis added). The Hearing Officer's findings are correct in light of the established case law regarding *res judicata*.

The Court of Appeals' published Opinion creates a discernible departure from existing law and provides insufficient reasoning for its decision to do so. Consequently, Appellants respectfully request that this Honorable Court reverse the decision of the Court of Appeals and provide a bright line rule to eliminate confusion as to the application of *res judicata* to disability retirement applications under KRS 61.600.

III. The Court of Appeals erred when it failed to properly apply established case law with regard to issue preservation, and consequently, erroneously considered an unpreserved argument.[17]

The Court of Appeals next erred when it failed to apply existing law on issue preservation when new law is established during the pendency of an action. The Court of Appeals in *Hollen v. Kentucky Retirement Systems*, 2009-CA-000119-MR (Ky. App.

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other as well as years of established case law.

2010)[18], cited *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997) and held that a new precedent should not be retroactively applied unless the subject issue was preserved for review.

The case of *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8 (Ky. 2011) had not been issued when the Agency's most recent final determination was made. The Court of Appeals erroneously held that Appellee preserved the issue of alcoholism as behavior and not a condition in his exceptions. However, the Appellee's exception on this issue merely challenged the Hearing Officer's finding of the presence of alcoholism, but raised no challenge to its classification as a "behavior" rather than a "medical condition."

The law is clear that specific exceptions to the recommended order are required, and judicial review is limited to only those factual and legal findings to which explicit exception was taken. Particularly, *Givens v. Com.*, 359 S.W.3d 454 (Ky. App. 2011), citing *Collins v. Conley*, 288 S.W.316 (Ky. 1926), stressed that:

> *Collins* also underscores that exceptions must be specific. A clear, concise statement of a party's objection or objections obviates the need for the agency head or the Court, on subsequent judicial review, to guess at, or decipher, the party's intended argument regarding error. **For this reason, even properly filed exceptions, containing objections 'couched in general terms with no specification of any concrete or particular error...are insufficient to authorize us or the court below to consider or to disturb the verdict for any alleged error, though valid, that may be argued as embraced in such general language**.' *Challinor v. Axton*, 54 S.W.2d 600, 601 (Ky. 1932).

Givens at 462. (Emphasis added). *Givens* stands for the proposition that even if exceptions are filed, a failure to clearly identify an issue in the exceptions deprives a

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[17] This issue was preserved for appeal in the Appellants' pleadings before Franklin Circuit Court, their Pre-hearing Statement and Briefs before the Court of Appeals, and in their Motion for Discretionary Review.
[18] Cited pursuant to CR 76.28(4)(c) and attached hereto as Appendix M.

higher court of jurisdiction to review that issue. This Honorable Court recently reaffirmed that the party must raise specific arguments in exceptions to preserve those issues for further judicial review in *West v. Kentucky Retirement Systems,* 413 S.W.3d 578, 583 (Ky. 2013).

The Court of Appeals also recently issued an opinion in *Willmer Robinson v. Kentucky Retirement Systems*, 2014-CA-000152-MR (Ky. App., 2015)[19] acknowledging this Honorable Court's opinion in *West*, and upholding its own decision from *Givens* that it was inappropriate for the circuit court to expand its review beyond those issues specifically preserved in the exceptions. The *Robinson* decision demonstrates the correct application of the law, as set forth in *West*, and was issued merely a month after the decision in the present matter. The correct application of the law in *Robinson* illustrates the inconsistent findings by the Court of Appeals in the present matter.

The Court of Appeals cited *Kentucky Retirement Systems v. Stewart*, 2011 CA-001262-MR and 2011-CA-001340-MR, for the proposition that since the circuit court is hearing an original action, there is no requirement for issues to be preserved for appeal. Such a finding directly contradicts the published case law of *Personnel Board v. Heck*, 725 S.W.2d 13 (Ky. App. 1987), which holds that the failure to raise an issue before an administrative body precludes a litigant from asserting that issue in an action for judicial review of the administrative body's decision. This finding also directly conflicts with this Honorable Court's holding in *Rapier v. Philpot*, 130 S.W.3d 560, 563-564 (Ky. 2004) that:

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[19] Cited pursuant to CR 76.28(4)(c) and attached hereto as Appendix N.

> Under Chapter 13B, the filing of exceptions provides the means for preserving and identifying issues for review by the agency head. In turn, filing exceptions is necessary to preserve issues for further judicial review. . . . Under Kentucky law, this rule of preservation precludes judicial review of any part of the recommended order not excepted to *and* adopted in the final order.. . .

(Internal citations omitted)(emphasis original). The present matter is the newest in a long line of decisions in which the Court of Appeals disregarded the directives of this Honorable Court in *West*, and cited results-oriented unpublished opinions instead of published controlling case law issued by this Honorable Court.

This Honorable Court should reverse the Court of Appeals' determination on this issue as it completely disregards published case law which requires that a party preserve specific issues in its exceptions in order to pursue judicial review on those issues. The Court of Appeals' discussion on issue preservation resulted in an erroneous finding that the Appellee preserved the issue of alcoholism as a behavior and not a condition. This finding is in error based upon established case law and creates significant confusion on the issue of preservation. This Honorable Court should reverse the Court of Appeals so that conflicts in the law are not created or perpetuated.

IV. The dissent in the Court of Appeals' Opinion regarding the issue of alcoholism as a pre-existing condition should be given further consideration as a clarification of this Honorable Court's holding in *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8 (Ky. 2011).[20]

Appellants have not presented arguments related to the issue of alcoholism as a medical condition rather than a behavior through this litigation based upon this

Honorable Court's decision in *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8 (Ky. 2011), which was issued after the present litigation commenced. However, Judge VanMeter issued a well-reasoned and thoughtful dissent to the majority opinion in this matter, which this Honorable Court should adopt as it provides a distinct clarification of the holding in *Brown*.

In *Brown*, this Honorable Court held that smoking is a behavior and not a health "condition" as required by KRS 61.600(3)(d). Here, the dissent at the lower court provided a clear distinction to *Brown* with regards to alcoholism. As Judge VanMeter correctly concluded, substance abuse (including Alcohol Use Disorder) is a diagnosable psychiatric disorder as set forth in the Diagnostic and Statistical Manual of Mental Disorders 5th Edition (2013)(DSM-5) and, as such, is a "mental illness, disease or condition" for purposes of KRS 61.600(3)(d)[21].

In his dissent, Judge VanMeter agreed that mere alcohol consumption is likely not a condition under KRS 61.600(3)(d), but that it is a factual determination whether an individual suffered from the pre-existing disorder of alcohol abuse, as opposed to mere alcohol consumption. As a factual determination, the Hearing Officer properly assessed the evidence which showed that the Appellee had pre-existing alcoholism. "It is the **exclusive province** of the administrative trier of fact to pass upon the credibility of witnesses, and the weight of the evidence." *500 Associates, Inc. v. Natural Resources*

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[20] This issue was raised by the Court of Appeals' dissent, and was preserved in the Appellants' Motion for Discretionary Review.

[21] KRS 61.600(3)(d) represents the current version of the statute. At the time of Appellee's last day of paid employment, this same language was contained in KRS 61.600(2)(d).

and Environmental Protection Cabinet, 203 S.W.3d 121, 132 (Ky. App. 2006)(Emphasis added).

Judge VanMeter properly noted this Honorable Court's decision in *Kentucky Retirement Systems v. West*, 413 S.W.3d 578 (Ky. 2013), that the claimant bears the burden of proving that a disabling condition did not pre-exist membership in the Retirement Systems, and that the record in this matter contained reports that Appellee suffered from alcoholism. Judge VanMeter further noted Appellee's efforts to "clarify" the record after his initial denial for benefits. Judge VanMeter highlighted in particular that the Hearing Officer may weigh the evidence such as changes in testimony, which "'are quite naturally regarded with great distrust and usually given very little weight.' *Hensley v. Commonwealth*, 488 S.W.2d 338, 339 (Ky. 1972)." (Court of Appeals' Opinion, p. 17).

The dissent in this matter is consistent with existing law and provides clarification to one of this Honorable Court's recent determinations. As such, Appellants believe that this Honorable Court should adopt the dissent's analysis and conclusion on alcoholism as a pre-existing condition.

V. The Court of Appeals erred in concluding that the Agency's findings were not supported by substantial evidence.[22]

The multiple errors committed by the Court of Appeals and discussed above demonstrate an erroneous application of the law. These errors resulted in the misanalysis

[22] This issue was preserved for appeal in the Appellants' pleadings before Franklin Circuit Court, their Pre-hearing Statement and Briefs before the Court of Appeals, and in their Motion for Discretionary Review.

of the substantial evidence standard. In finding that Appellants' conclusions were not supported by substantial evidence, the Court of Appeals reconsidered evidence that was noted by the Hearing Officer to be duplicative of that submitted with the first application. Those records, therefore, were properly not reconsidered under the doctrine of administrative *res judicata*, as discussed more fully above.

Substantial evidence of record supports the Appellants' determination that Appellee was not entitled to enhanced disability retirement benefits. Appellants' determination in Appellee's second administrative hearing can best be summarized as follows:

1. Appellants previously ruled that Appellee had not provided sufficient objective evidence to support his claim for disability, based both on a failure to prove he was permanently incapacitated from his previous job as of his last day of paid employment, and a failure to prove that his alleged incapacity was not directly or indirectly related to a bodily injury, mental illness, disease, or condition that existed prior to Appellee's membership date.
2. Much of the information provided was duplicative of that considered in Appellee's first application.
3. Appellee's main argument was an attempt to show that his diabetes and alcohol use were not pre-existing conditions. However, Appellee failed to provide additional medical evidence to show that he could not perform his job duties.

4. The new information provided in the present matter substantially post-dates Appellee's employment and is an attempt to change Appellee's medical records based upon his statements.

5. Based upon the new medical information submitted, his condition had improved since he was found to be not disabled at his first hearing.

(A.R., pp. 1001-1003).

The Hearing Officer noted that Appellee had been found not to be disabled in his first administrative appeal, and that he had not provided new objective medical evidence that would show that he could not perform his job duties since his last day of paid employment. The information Appellee provided as part of his second application was either duplicative of that which had already been considered by the previous Hearing Officer or long post-dated his last day of paid employment, and thus, did not reflect his condition since his last day of paid employment. The Hearing Officer found Appellee's condition had improved since the time of his first appeal, when he was found to be not disabled (which he did not appeal).

As discussed above, the previous findings of the agency are binding because Appellee did not appeal them. Appellee did not produce any new evidence (not previously considered) with his second application that would show that he was incapacitated since his last day of paid employment. The majority of records Appellee submitted for his second application were actually duplicative of those records from his initial administrative appeal, which had previously considered. (For example, A.R., pp. 581-582 [previously found at pp. 166-167, 312-313], p. 656 [previously found at p. 306], p. 899 [previously found at p. 438]). All of these records were already considered by the

Board of Trustees and Appellee did not appeal that determination. Therefore, the findings based upon those records are binding and the law of the case, under the doctrine of *res judicata*, as discussed above.

Appellee did not prove by new objective medical evidence that he was incapacitated since his last day of paid employment. The records that Appellee submitted as a part of his second application that were not duplicative of those submitted with his first application long post-date Appellee's last day of paid employment. The Hearing Officer made no error in giving little weight to records that post-dated Appellee's employment by two years or more, in making the determination that Appellee did not prove permanent incapacity since his last day of paid employment and for a continuous period of no less than twelve months following. Appellants' final order denying benefits was supported by substantial evidence, including Appellee's failure to present any new evidence from the relevant time period under KRS 61.600.

The Court of Appeals also erroneously upheld Franklin Circuit Court's finding that Appellee could not safely drive commercially based upon a public safety argument. In a previous case, the Court of Appeals very clearly stated that there is no higher "public safety standard" in a disability determination for those driving commercial vehicles. In *Kentucky Retirement Systems v. Patton*, 2009 WL 2901297 (Ky. App)[23], the Court of Appeals disagreed with the Circuit Court's analysis that the Systems must be more rigid when deciding a case involving children's safety. "Although we certainly recognize the importance of safe transportation for children, the law makes no distinction between a

[23] Cited pursuant to CR 76.28(4)(c) and attached hereto as Appendix O.

school bus driver and another type of worker. Each worker must meet the permanent incapacity requirement under KRS 61.600." Patton at 2.

With regard to the Court of Appeals' holding that Appellee's ability to drive his own car does not show that he could drive a commercial vehicle, Appellants would point to Appellee's own testimony at the initial administrative hearing held on December 12, 2003, over a year after his last day of paid employment. Appellee testified at that hearing that he maintained a valid Commercial Driver's License (CDL). In order to qualify for a CDL, a driver must be physically capable of safely operating a commercial vehicle and must pass regular physical examinations. It is notable that none of the Appellee's physicians revoked his CDL, nor did Appellee voluntarily surrender his CDL. Appellee still possessed a valid CDL over a year after his last day of paid employment. Thus, the Court of Appeals' finding is in error.

There is a significant amount of case law establishing the fact finder's right to make determinations on issues of credibility and weight given to evidence. As long as there is substantial evidence in the record supporting the agency's finding, the Court must defer to that finding, even if there is evidence to the contrary. *Kentucky Comm'n on Human Rights v. Frasier*, 625 S.W.2d 852 (Ky. 1981). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298 (Ky. 1972). As long as substantial evidence exists to support the agency's decision, that decision cannot be overturned.

In reviewing an agency decision, the Court may overturn the decision if the agency acted arbitrary or outside the scope of its authority, if the agency applied an

incorrect rule of law, or if the decision itself is not supported by substantial evidence on the record. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298 (Ky. 1972). Substantial evidence "means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglass v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). As long as there is substantial evidence in the record to support the agency's finding, the Court must defer to that finding, even if there is evidence to the contrary. *Kentucky Comm'n on Human Rights v. Frasier*, 625 S.W.2d 852 (Ky. 1981). The Court's role is to review the administrative decision, not to reinterpret or reconsider the merits of the claim. *Kentucky Unemployment Ins. Comm'n v. King*, 657 S.W.2d 250 (Ky. App. 1983).

Likewise, the Court may not substitute its own judgment as to the inferences to be drawn from the evidence of record for that of the administrative agency. *Railroad Comm'n v. Chesapeake & Ohio Ry.*, 490 S.W.2d 763 (Ky. 1973). The trier of facts in an administrative agency "is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it." *Bowling v. Natural Resources and Envtl. Protection Cabinet*, 891 S.W.2d 406, 409-410 (Ky. App. 1994). The Court of Appeals emphasized, "[t]o put it simply the trier of facts in an administrative agency may consider all the evidence and chose the evidence that he believes." *Id.* at 410. The possibility of drawing two inconsistent conclusions for the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298 (Ky. 1972). *Kentucky Board of Nursing v. Ward*, 890 S.W.2d 641 (Ky. App. 1994) and *Starks v. Kentucky Health Facilities*, 684 S.W.2d 5 (Ky. App. 1984) are cases, in a long line of cases, holding that administrative

agency's findings, which are supported by substantial evidence, must be accepted by the reviewing court. Furthermore, "it is the **exclusive province** of the administrative trier of fact to pass upon the credibility of witnesses, and the weight of the evidence." *500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet*, 203 S.W.3d 121, 132 (Ky. App. 2006)(Emphasis added).

In the case at bar, the Court of Appeals ignored this case law and reweighed the evidence, including evidence that was a part of the Appellee's initial determination and thus, subject to administrative *res judicata*. Thus, the Court of Appeals erred by exceeding the scope of its review and reweighing the evidence in contravention of existing law. As such, its decision should be overturned.

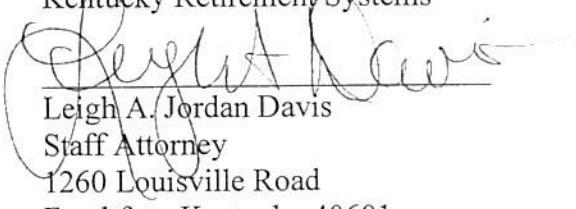
CONCLUSION

The Court of Appeals disregarded a decade of established law and erroneously disturbed the long established doctrine of administrative *res judicata* as it applies to Kentucky Retirement Systems' disability determinations. The Court of Appeals further erred when it failed to follow the law with regard to issue preservation. In so doing, the Court of Appeals erroneously reweighed the evidence in direct contravention to its role as an appellate court.

Consequently, the opinion of the Court of Appeals must be reversed and this Honorable Court must issue an opinion correcting the errors of the Court of Appeals and affirming the decision of the Appellants. Additionally, the dissent in the Court of Appeals Opinion represents a well stated clarification of this Honorable Court's decision in *Brown v. Kentucky Retirement Systems* and should be adopted by this Honorable Court.

BASED ON THE FOREGOING, Kentucky Retirement Systems respectfully prays and demands that the decision of the Court of Appeals be reversed.

Respectfully submitted,
Kentucky Retirement Systems



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